FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554
JAN 8 2002

OFFICE OF
MANAGING DIRECTOR

Joseph M. Sandri, Jr.
VP & Regulatory Counsel
Winstar Communications, Inc.
1615 L Street, N.W.
Suite 1260
Washington, D.C. 20036

Re: Petition for Waiver
Fee Control No.: 00000RROG-01-012

Dear Counsel:

This letter is in response to your request submitted on behalf of Winstar Communications, Inc., for waiver pursuant to Section 1.1166 of the Commission's Rules, 47 C.F.R. § 1.1166, of regulatory fees for Fiscal Year 2001. You also seek a waiver of the provisions of Section 1.1166(c) of the Commission's Rules, 47 C.F.R. § 1.1166(c), which would ordinarily require submission of the regulatory fees along with the request for waiver.

You state that Winstar filed for protection under Chapter XI Bankruptcy on April 18, 2001 and that waiver of these fees would promote the public interest by allowing Winstar to conserve its limited resources.

Section 1.1166 of the Commission's Rules, 47 C.F.R. § 1.1166, provides that regulatory fees may be waived upon a showing of good cause and a finding that the public interest will be served thereby. We find that Winstar's filing of a Chapter XI petition in bankruptcy court substantiates its claim of financial hardship and demonstrates good cause for waiver of the filing fees. See Implementation of Section 9 of the Communications Act, 10 FCC Rcd 12759, 12762 (1995) (evidence of bankruptcy or receivership sufficient to establish financial hardship for purposes of waiver of regulatory fees). Therefore, your requests for waiver of the provisions of Section 1.1166(c) and for waiver of Fiscal Year 2001 regulatory fees are granted.

If you have any questions concerning this letter, please contact the Revenue and Receivable Operation Group at (202) 418-1995.

Sincerely,

Mark A. Reger
Chief Financial Officer

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SEP 17 2001

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

winstar

ORIGINAL

1615 L Street, NW
Suite 1260
Washington, DC 20036
202 367.7600

September 17, 2001

Ms. Magalie R. Salas
Secretary
Federal Communications Commission
Attention: Managing Director
445 12th Street, SW
Washington, D.C. 20554

Re: 2001 Common Carrier Regulatory Fees **Request for Waiver**

Dear Sir/Madam:

Pursuant to Sections 1.1159(b) and (c) and 1.1166(a) and (c) of the rules of the Federal Communications Commission ("FCC" or "Commission"), this is to request waiver of 2001 regulatory fees for Winstar Communications, Inc. (debtor-in-possession) ("Winstar") and its subsidiaries.

On April 18, 2001, Winstar Communications, Inc., along with certain of its subsidiaries, filed for protection under Chapter 11 of the U.S. Bankruptcy Code with the U.S. Bankruptcy Court for the District of Delaware.[1] Pursuant to FCC precedent,[2] this situation provides good cause for complete waiver of its 2001 regulatory fees. Waiver of these fees would promote the public interest by allowing Winstar to conserve its limited financial resources and utilize the Chapter 11 process to restructure its balance sheet and business plan and continue to provide service to its U.S. business customers. This waiver request does not include the fees or forms which Winstar would otherwise be required to submit, as Winstar requests to defer payment due its current financial hardship, supported by documentation referred to in footnote 1.

[1] As evidence of Winstar's Chapter 11 status, submitted with this letter is an Order of the U.S. Bankruptcy Court for the District of Delaware enforcing Sections 362 and 525 of the United States Bankruptcy Code with respect to Winstar Communications, Inc. and certain of its direct and indirect subsidiaries, the debtors and debtors in possession of these Chapter 11 cases.

[2] Winstar points out that there is precedent for such a waiver. In re: MOBILEMEDIA CORPORATION, et al, Applicant for Authorizations and Licenses of Certain Stations in Various Services, *Memorandum Opinion and Order*, Federal Communications Commission WT Docket No. 97-115, Paragraphs 39 & 40, Released February 5, 1999 (copy attached).

Should you have any questions regarding this correspondence, please contact Tom Snedeker or the undersigned at 202-367-7600.

Sincerely,

Joseph M. Sandri, Jr.
VP & Regulatory Counsel

Attachments

DUPLICATE ORIGINAL

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: WINSTAR COMMUNICATIONS, INC., et al., Debtors.	Chapter 11 Case No. 01-~~1340~~ 1430 ( ) (Jointly Administered)

ORDER ENFORCING SECTIONS 362 AND 525
OF THE UNITED STATES BANKRUPTCY CODE

This matter having come before the Court upon the motion (the "Motion") filed by Winstar Communications, Inc. and certain of its direct and indirect subsidiaries, the debtors and debtors in possession in these chapter 11 cases (collectively, the "Debtors"), seeking entry of an order pursuant to sections 362 and 525 of title 11, United States Code (the "Bankruptcy Code") enforcing the Bankruptcy Code's automatic stay and antidiscrimination provisions; and the Court having considered the submissions and arguments of counsel, and the opposition thereto, if any; and it appearing that the Court has jurisdiction over the matter pursuant to 28 U.S.C. § 157(b)(2); and the Court having determined that granting the relief requested in the Motion is in the best interest of the Debtors and their estates, creditors and equity holders; and it appearing that notice of the Motion has been given to the Office of the United States Trustee and the Debtors' twenty largest unsecured creditors, and that no other or further notice need be given; and for sufficient cause shown, it is

ORDERED that all persons (including individuals, partnerships and corporations, and all those acting for or on their behalf), and all foreign or domestic governmental units (and all those acting for or on their behalf), except as otherwise expressly permitted under the

Bankruptcy Code, are hereby stayed, restrained and enjoined from:

1. Commencing or continuing any judicial, administrative or other proceeding against the Debtors, including the issuance or employment of process, that was or could have been commenced before any of the Debtors' chapter 11 cases were commenced, or recovering a claim against any of the Debtors that arose before the commencement of any of their chapter 11 cases;

2. Enforcing a judgment obtained before the commencement of any of the Debtors' chapter 11 cases against any of the Debtors or against property of any of the Debtors;

3. Taking any action to obtain possession of property of any of the Debtors or of property from any of the Debtors;

4. Taking any action to create, perfect or enforce any lien against property of any of the Debtors, to the extent that such lien secures a claim that arose before the commencement of any of the Debtors' chapter 11 cases;

5. Taking any action to collect, assess or recover a claim against any of the Debtors that arose before the commencement of any of their chapter 11 cases;

6. Offsetting any debt owing to any of the Debtors that arose before the commencement of any of the Debtors' chapter 11 cases against any claim against any of the Debtors; and

7. Commencing or continuing any proceeding before the United States Tax Court concerning any of the debtors;

and it is further

ORDERED that all persons and all foreign and domestic governmental units, and all those acting on their behalf, including sheriffs, marshals, constables, and other or similar law enforcement officers and officials are stayed, restrained and enjoined from, in any way, seizing, attaching, foreclosing upon, levying against or in any other way interfering with any and all of the property of any of the Debtors, wherever located; and it is further

ORDERED that the Debtors and their agents and employees shall continue to enjoy access to all aspects of their telecommunications network including, without limitation, the equipment, site locations and customers which form the basis of the Debtors' telecommunications network in order to, among other things, make repairs, perform maintenance, address customer concerns and needs, and solicit new customers and sources of revenue, and all persons and entities, including, without limitation, landlords of and lessors to the Debtors, shall continue to provide all such access, absent further order of this Court; and it is further

ORDERED that this Order shall not affect the exceptions to the automatic stay contained in section 362(b) of the Bankruptcy Code or the right of any party in interest to seek relief from the automatic stay in accordance with section 362(d) of the Bankruptcy Code; and it is further

ORDERED that pursuant to section 525 of the Bankruptcy Code, all governmental units are prohibited and enjoined from denying, revoking, suspending, or refusing to renew any license, permit, charter, franchise, or other similar grant to, condition such a grant to, or discriminate with respect to such a grant against, any of the Debtors solely because one or all of the Debtors: (i) are debtors under the Bankruptcy Code; (ii) may have been insolvent before the commencement of the Debtors' chapter 11 cases; or (iii) may be insolvent during the pendency of the Debtors' chapter 11 cases; and it is further

ORDERED that this Order is intended to be declarative of and coterminous with, and shall neither abridge, enlarge nor modify, the rights and obligations of any party under sections 362 and 525 of the Bankruptcy Code.

Dated: Wilmington, Delaware
April 19, 2001

JUDGE

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
MOBILEMEDIA CORPORATION, et al.	)	WT Docket No. 97-115
	)	
Applicant for Authorizations and Licenses	)	
of Certain Stations in Various Services	)	
	)	

MEMORANDUM OPINION AND ORDER

Adopted: February 2, 1999 **Released:** February 5, 1999

By the Commission: Commissioner Furchtgott-Roth concurring in part and issuing a statement at a later date.

1. By this memorandum opinion and order, we conditionally grant the Applications for Transfer of Control and Petition to Terminate and for Special Relief, filed September 2, 1998, by MobileMedia Corporation, debtor-in-possession, and Arch Communications Group, Inc. We find that the parties have made a sufficient showing to justify terminating this hearing proceeding pursuant to the Commission's Second Thursday doctrine.

I. BACKGROUND

2. MobileMedia Corporation (MobileMedia), the subject of this proceeding, is the fourth largest paging company in the United States. The Commission designated this proceeding for a license revocation hearing after MobileMedia, on October 15, 1996, disclosed the results of an internal investigation concluding that MobileMedia had filed at least 289 false notifications on FCC Form 489 and also filed at least 94 defective "40-Mile Rule" applications. MobileMedia Corp., 12 FCC Rcd 14896 (1997). According to MobileMedia's own investigation, which had been conducted by outside counsel, these notifications falsely reported the construction of facilities that had not, in fact, been built. The October 15, 1996 report of the investigation also disclosed the identities of several members of senior management who participated in the deception. The Commission noted that this case "appears to be unprecedented . . . in terms of the sheer number of false filings involved." Id. at 14901 ¶ 12.

3. The designated issues inquire into the facts and circumstance surrounding the filing of false information with the Commission and the construction and operation of facilities without authorization. The issues also inquire into the possibility that false information was contained in the October 15, 1996 report itself. As to each issue, the Commission sought to determine which MobileMedia officers, directors, or senior management officials participated in or knew of misconduct. Prior to designation, the Wireless Telecommunications Bureau (Bureau) terminated more than 250 authorizations held by MobileMedia for stations that were not constructed and providing service to subscribers by the applicable deadline and dismissed as defective nearly 100 MobileMedia applications predicated on unconstructed facilities. Public Notice, 12 FCC Rcd 792 (1997).

4. On June 6, 1998, the Commission stayed this proceeding to permit MobileMedia to avail itself of relief under the Commission's Second Thursday doctrine.[1] MobileMedia Corp., 12 FCC Rcd 7927 (1997). See Second Thursday Corp., 22 FCC 2d 515, recon. granted, 25 FCC 2d 112 (1970). Second Thursday is an exception to the general rule that a licensee may not transfer facilities involved in a hearing concerning its character qualifications unless it is found qualified to remain a licensee. See Jefferson Radio Co. v. FCC, 340 F.2d 781, 783 (D.C. Cir. 1964). Under Second Thursday, when such a licensee has gone into bankruptcy, the station license may be assigned, usually by a trustee in bankruptcy, "if individuals charged with misconuuct will have no part in the proposed operations and will either derive no benefit from favorable action on the [assignment or transfer] application or will receive only a minor benefit which is outweighed by equitable considerations in favor of innocent creditors." Second Thursday Corp., 22 FCC 2d at 516 ¶ 5. The Second Thursday doctrine "accommodates the policies of the federal bankruptcy law with those of the Communications Act." LaRose v. FCC, 494 F.2d 1145, 1147 n.2 (D.C. Cir. 1974).

5. MobileMedia reported that on January 30, 1997, it filed reorganization proceedings under Chapter 11 of the Bankruptcy Code in the Bankruptcy Court for the District of Delaware, and is now a debtor-in-possession of the licensed facilities. During the period of the stay, MobileMedia filed monthly status reports detailing extensive and difficult negotiations to arrive at a suitable reorganization plan. Ultimately, on August 20, 1998, MobileMedia submitted to the court the Proposed Plan of Reorganization reflected in the application before us. MobileMedia indicates that on December 11, 1998, the court approved the Disclosure Statement for the plan, that creditor voting on the plan is scheduled to be concluded by January 27, 1999, and that a confirmation hearing on the plan is scheduled for February 3, 1999.

II. PROPOSED REORGANIZATION

6. The proposed reorganization involves the merger of MobileMedia with Arch Communications Group, Inc. (Arch), the nation's third largest paging company. The merged company will hold the various licenses through subsidiaries. Under the plan, MobileMedia's

[1] The Commission originally stayed the proceeding for a period of 10 months, until April 6, 1998. On that date, an administrative stay issued to permit the Commission to consider MobileMedia's request for an extension. MobileMedia Corp., FCC 981-17 (OGC Apr. 6, 1998). The Commission subsequently extended the stay until October, 6, 1998, by which time the parties had filed the application now before us. MobileMedia Corp., 13 FCC Rcd 14770 (1998).

existing shareholders will receive no consideration for their stock, and their shares will be cancelled. The claims of MobileMedia's secured creditors, in the amount of $649 million, will be paid in full. These creditors have already received $170 million from the sale of MobileMedia's tower site assets and will be paid an additional $479 million by Arch. MobileMedia's unsecured creditors, who have approximately $464 million in claims, will receive a combination of stock and stock rights that will enable them to own between 64.2 percent and 82.7 percent of the merged company. Arch's existing stockholders would receive a combination of stock and stock rights that would entitle them to own between 17.3 percent and 35.8 percent of the merged company.

7. MobileMedia[2] asks that the Commission approve the various transfers associated with the reorganization plan and terminate the hearing proceeding. MobileMedia claims that the proposed plan comports with the Second Thursday doctrine. It further claims that the merger would not have an adverse competitive effect. Mobilemedia also asks the Commission to waive certain rules and to grant other ancillary relief. Public notice of the proposed plan was given on October 15, 1998. Public Notice, 13 FCC Rcd 20334 (WTB 1998). Comments were received on November 16, from the Bureau, The Chase Manhattan Bank as agent for MobileMedia's secured creditors (Chase Manhattan), and Orbital Communications Corporation (ORBCOMM). Reply comments were received on November 25 from David A. Bayer, and on November 27 from MobileMedia, Arch, and Chase Manhattan.

III. SECOND THURSDAY SHOWING

8. Mobilemedia contends that the proposed reorganization complies with the standards articulated in Second Thursday. MobileMedia asserts that no alleged wrongdoer would either participate in the operations of the merged company or receive any significant benefits under the reorganization plan. MobileMedia further asserts that the reorganization would serve to protect innocent creditors who are owed hundreds of millions of dollars and thereby accommodate the Communications Act and the policies of the federal bankruptcy law, as the Second Thursday doctrine contemplates.

9. MobileMedia focuses in particular on how the reorganization will affect potential wrongdoers, a matter upon which the Commission has previously spoken in this proceeding. By way of background, the Commission initially treated as potential wrongdoers all former and current officers, directors, and senior managers of MobileMedia. MobileMedia Corp., 12 FCC Rcd at ¶ 17. The Commission directed MobileMedia to demonstrate, as part of any Second Thursday showing, that such potential wrongdoers would not receive compensation for any equity interests they held and would not participate in the future operation or management of the company. Subsequently, however, the Commission ruled that this definition of potential wrongdoers was overly broad. See MobileMedia Corp., 13 FCC Rcd 10634 (1998); MobileMedia Corp., 12 FCC Rcd 11861 (1997). First, some officers, directors, and managers of MobileMedia could not be regarded as potential wrongdoers because they were not associated with MobileMedia at the time

[2] For simplicity, we will refer to the arguments made in the Second Thursday request as MobileMedia's, although Arch is also a party to the request..

the wrongdoing occurred. Additionally, the Commission found that there was no justification for treating as potential wrongdoers individuals against whom there were no specific allegations that they had participated in or approved deceptive acts.

10. Ultimately, the Commission concluded that there was justification for treating four individuals as potential wrongdoers. The October 15 Report (paragraph 2, supra) alleged that Gene P. Belardi, former Secretary and Regulatory Counsel, and Kenneth R. McVay, former Secretary, Vice President, and General Counsel, were primarily responsible for carrying out the deception of the Commission and that they were fired by MobileMedia because of their involvement. Moreover, according to the Report, there is an unresolved dispute as to the responsibility of John M. Kealey, former Director, President, and Chief Operating Officer, and Gregory M. Rorke, former Director and Chief Executive Officer. The Commission had no specific allegations that other individuals participated in or approved misconduct.

11. MobileMedia asserts that none of the alleged wrongdoers would participate in the management or operation of the merged company or receive any significant benefits as a result of the reorganization. According to MobileMedia, Belardi and McVay were terminated by MobileMedia in September 1996, soon after the misconduct was discovered. By that time Kealey and Rorke had already left Mobilemedia for other reasons. MobileMedia states that none of the four will have any role in the operations of the merged company.

12. MobileMedia reports that two of the four alleged wrongdoers hold stock or stock options in MobileMedia. Specifically, Kealey is a current stockholder, having acquired shares on the open market in 1995. Kealey and Rorke have options to acquire Mobilemedia stock.[3] MobileMedia represents that Kealey and Rorke will not receive any compensation for their stock and/or rights as part of the reorganization, since their holdings will be cancelled. Additionally, MobileMedia reports that during the pendency of the stay in this proceeding the alleged wrongdoers, as well as other then-current officers and directors were barred from trading any stock they held.

13. As an additional matter, MobileMedia reports that Belardi and Kealey have submitted pre-petition proofs of claims against MobileMedia in the bankruptcy proceeding. Both Belardi and Kealey claim that they are owed additional performance bonuses based on increases in company earnings. They also have claims based on life and health insurance premiums that they claim the company was obligated to pay. Belardi's claims total \$408,856.49 for bonuses and \$15,015.59 for insurance premiums. Kealey's claims are \$1,162,854.90 for bonuses and \$17,321.74 for insurance premiums. MobileMedia contends that these claims should not be considered benefits that would bar the grant of Second Thursday relief. It states that it is vigorously opposing the claims before the bankruptcy court. Moreover, MobileMedia argues that the claims should not be considered relevant with respect to Second Thursday relief because they arise from prior contractual arrangements and not from any interest by suspected wrongdoers as owners or investors. In any

[3] Mobilemedia indicates that Belardi and McVay formerly held options to acquire shares but that these expired when they were terminated by the company.

event, MobileMedia maintains that the amounts involved should be considered insignificant in relation to the overall reorganization, which provides for recovery by innocent creditors owed more than $1 billion.

14. Chase Manhattan fully supports the grant of Second Thursday relief. It emphasizes that the plan would further the objectives of the bankruptcy code by providing for relief to innocent creditors. Chase Manhattan observes that secured creditors with some $649 million in claims would receive 100 percent payment and unsecured creditors with approximately $479 million in claims would be entitled to a majority equity position in the merged company.

15. The Bureau generally supports MobileMedia's request. The Bureau agrees that suspected wrongdoers will not participate in the future operations of the licensed facilities and that they will receive no significant benefit under the plan. In this regard, the Bureau asserts that even if the claims by Belardi and Kealey are honored, they should be considered incidental benefits as compared with the vastly greater benefits to innocent creditors. The Bureau, however, expresses one reservation about approving the plan. The Bureau observes that, in light of the misconduct that occurred, Mobilemedia has undertaken a company-wide compliance program. As result of this program, MobileMedia has reported discovering discrepancies between its records and the Commission's records that may indicate additional violations of the Commission's rules. The Bureau asks that the Commission to condition the grant of Second Thursday relief on any enforcement action the Bureau or the Commission may deem appropriate.

16. In response to the Bureau's objection, MobileMedia reports that it has examined the discrepancies it discovered and found that they do not involve any serious misconduct. According to MobileMedia, the vast majority of discrepancies had satisfactory explanations and a relatively few involved licensee error, mostly by entities from whom MobileMedia acquired the facilities. Arch argues that there is no justification for bringing an enforcement action against a licensee already seeking Second Thursday relief. Chase Manhattan contends that any enforcement action could be taken after the transfer. In further comments, filed January 26, 1999,[4] the Bureau maintains that while the discrepancies found do not raise questions about MobileMedia's basic qualifications they do reflect the type of violations for which forfeitures might be appropriate and reiterates that grant of Second Thursday relief should be conditioned on whatever enforcement action might be deemed necessary.

17. ORBCOMM objects to the request for Second Thursday relief. According to ORBCOMM, the Commission should treat as a potential wrongdoer David A. Bayer, a director of MobileMedia since 1994, who served as MobileMedia's Acting Chief Executive Officer and President from July 15, 1996 to August 30, 1996 and from November 21, 1996 to February 11, 1997. Orbcomm notes that Bayer participated in the preparation of the October 15 report and that one issue designated in this case questions whether that report contained false information.

18. As to the allegations regarding Bayer, MobileMedia, Arch, and Chase Manhattan, as

[4] The Bureau filed an erratum on January 29, 1999.

well as Bayer himself, reply that Bayer was validly excluded as a potential wrongdoer.

19. We will grant Mobilemedia Second Thursday relief. There is no dispute that the proposed transaction will further the bankruptcy code by providing for a substantial recovery to innocent secured and unsecured creditors holding massive amounts of debt.

20. Further, MobileMedia has made an adequate showing that potential wrongdoers will neither participate in the management or operations of the merged company nor receive significant benefits. In this regard, we reaffirm that Belardi, McVay, Kealey, and Rorke are the only individuals as to whom we have information raising a substantial and material question of personal misconduct. Although we have designated an issuing to inquire into the question of whether misconduct occurred in the preparation of the October 15 report, and Bayer had some involvement with the report, we have no information raising any adverse question specifically about Bayer's conduct. Indeed, the information before us indicates that it was Bayer who, immediately upon learning of possible misconduct at MobileMedia, set in motion the investigation that brought the misconduct to the attention of the Commission.

21. We agree with the parties who argue that any possible payments to Belardi and Kealey as a result of their preexisting contract claims should not bar Second Thursday relief. The Second Thursday doctrine does not limit approval of a transfer only to those situations in which suspected wrongdoers receive no direct benefit from the sale. Walter S. Kelley, Trustee, WXFL(TV), 10 FCC Rcd 4424, 4426 ¶ 12 (1995). Rather, the Commission balances the possible injury to regulatory authority that might flow from a wrongdoer's realization of benefit with the public interest in innocent creditors' recovery. Id. In making this balance, the Commission has examined a wide variety of factors. These include the amount of money likely to go directly to suspected wrongdoers; the percentage of the total sales price likely to go directly to suspected wrongdoers; whether suspected wrongdoers are likely to receive a direct monetary benefit or only an indirect benefit such as a reduction of liability; and whether suspected wrongdoers are in bankruptcy so that any money paid to them will be available to pay their creditors. Id. at 4426 ¶ 13. For example, in Shell Broadcasting, Inc., 38 FCC 2d 929, 933 ¶ 11 (1973), the Commission approved Second Thursday relief despite finding that 8.1 percent of the sales price served to relieve a suspected wrongdoer, who was the licensee's 87 percent owner, of personal liability. Here, while suspected wrongdoers might receive a sizable direct benefit of $1,604,048.72, that amount is miniscule (0.14 percent) in comparison with the benefits to innocent creditors, totalling more than $ 1 billion. Thus, even if the claims of Belardi and Kealey are honored, at least 99.86 percent of the claims that would be satisfied would be those of innocent creditors. Moreover, it bears noting that the claims of Belardi and Kealey arose from their status as employees of MobileMedia, not as owners or investors and would not be paid unless a court requires it.

22. Finally, we see no reason to condition the grant of Second Thursday relief because of the discrepancies disclosed by MobileMedia. While some of these matters might ordinarily be subject to enforcement action, in light of all of the circumstances of this bankruptcy proceeding, the imposition of forfeitures here would merely serve to diminish the assets going to innocent creditors pursuant to the grant of Second Thursday relief. We see no justification for doing this, and we will not take any further action in this regard.

IV. COMPETITIVE IMPACT

23. MobileMedia asserts that the proposed merger has no anticompetitive impact consistent with the guidelines set forth in connection with the Commission's review of the Bell Atlantic/NYNEX merger. See NYNEX Corp., 12 FCC Rcd 19985, 20008-09 ¶ 37 (1997). MobileMedia contends that there is no risk of anticompetitive impact in view of the highly competitive nature of the relevant markets and that the merger would permit certain procompetitive synergies through the combination of MobileMedia's and Arch's resources.

24. MobileMedia proposes that the relevant product market for analysis is the "messaging industry," including paging carriers providing traditional one-way radio transmission, as well as carriers that provide two-way messaging, voice messaging, and data transmission. As to the relevant geographic markets, MobileMedia argues that the messaging industry is primarily local and regional (although many carriers operate on a national basis) and that the relevant markets are principally significant individual metropolitan areas throughout the country.

25. MobileMedia contends that the markets so defined contain numerous diverse participants. For example, among the Metropolitan Statistical Areas, the 25 largest cities in the United States have an average of 29 paging licenses, not including resellers, and the 25 smallest have an average of 12. MobileMedia notes that there are currently more than 600 paging and messaging companies offering competitive alternatives to MobileMedia and Arch, including several operating at a national level and serving nearly 20 million customers, in virtually every geographic market. According to MobileMedia, further competition results from the activities of resellers and aggressive entry into the market by cellular, PCS, and SMR providers. MobileMedia claims that generally low barriers to entry ensure a high level of actual and potential entrants to the market thereby countering increases in concentration in the messaging market in recent years.

26. Given this level of competition, MobileMedia denies that there is any possibility of any adverse horizontal effects on competition. Thus, the merger should not give rise to any unilateral effects, because there is no reason to believe that consumers significantly rely on Arch (among the many competitive choices available) to be the competitive alternative to MobileMedia in the relevant markets. Similarly, there is no reason to believe that the merger will result in an increase in coordinated behavior among the many remaining competitors in the relevant markets. Finally, MobileMedia asserts that the merger will not significantly reduce the diverse utilization of spectrum capacity.

27. Additionally, MobileMedia cites several factors, which in MobileMedia's view will have a procompetitive impact. These include: (1) the combination of Mobilemedia's presence in large markets with Arch's presence in small to medium markets making the merged company a more effective competitor nationwide; (2) the potential for the merged company to deploy a nationwide narrowband PCS network based on MobileMedia's licenses; (3) the enhancement of both companies financial positions; and (4) technical, managerial, and administrative efficiencies, as well as synergies in marketing, distribution, and operations resulting in lower costs to consumers.

28. The Bureau agrees with MobileMedia that the proposed merger will not have an anticompetitive effect. The Bureau agrees generally with MobileMedia's definition of the relevant markets. To test MobileMedia's claims as to the impact of the merger, the Bureau selected for detailed examination three representative markets: Columbus, Ohio, Dayton, Ohio, and Manchester, New Hampshire. The Bureau chose these markets because they lay outside of the 30 largest (and most highly competitive) markets and because in each market both MobileMedia and Arch hold numerous licenses and are thus significant competitors.

29. The Bureau indicates that there are numerous competitors in all three of the representative markets. The Bureau found approximately 35 independent competitors in Columbus, 30 in Dayton, and 20 in Manchester. In the Bureau's view the large number of competitors and the highly dynamic nature of the messaging industry are sufficient to alleviate any concerns about unilateral or coordinated anticompetitive impact in the affected markets, despite the fact that the merger would measurably increase the concentration in the relevant markets.[5] Additionally, the Bureau generally agrees with MobileMedia's analysis of the positive synergies that would result from the merger.

30. We find that the record before us reflects no dispute as to the lack of anticompetitive impact of the proposed merger. The analysis of the merger submitted by MobileMedia is consistent with that of the Bureau and is persuasive. We conclude that the proposed merger will not have an anticompetitive impact.

V. ANCILLARY RELIEF

31. In connection with its request for Commission approval of the proposed reorganization, MobileMedia seeks ancillary relief. Mobilemedia requests: (1) temporary waiver of 47 C.F.R. § 24.101, the narrowband personal communications service (NPCS) "spectrum cap;" (2) grant of permanent authority to operate several facilities currently being operated by MobileMedia under interim authority; (3) waiver of FCC application fees; (4) a blanket exemption to the Commission's cut-off rules for transfers related to the merger; and (5) a waiver pursuant to 47 U.S.C. § 310(b)(4), to permit indirect foreign ownership in excess of the 25 percent statutory benchmark..

32. Spectrum cap. Under 47 C.F.R. § 24.101, NPCS licensees may not have an ownership interest in more than three channels in any geographic area. Arch currently has noncontrolling, but attributable, interests in two entities, each of which has regional authorizations in the five NPCS regions.[6] MobileMedia currently holds one nationwide NPCS license and five regional NPCS

[5] The Bureau calculated the merged company's market share of capacity in each market and the increase in the Herfindahl-Hirchman Index (HHI). In Columbus the merged company would have a market share of 37 percent with an increase in the HHI from 1378 to 1595. In Dayton, the market share would be 33 percent and the HHI would increase from 933 to 1308. In Manchester, the market share would be 26 percent and the HHI would increase from 815 to 1151. An HHI below 1000 is considered "unconcentrated;" an HHI of 1000-1800 is deemed "moderately concentrated;" and an HHI above 1800 is considered "highly concentrated." See NYNEX Corp., 12 FCC Rcd at 20055-56 ¶ 140 n.265.

[6] Arch has a 49.9 percent interest in BenBow PCS Ventures, Inc. and a 10.5 percent interest in CONXUS Communications, Inc.

licenses. Thus, after the merger, the merged company will have four licenses in each region -- one more than the rule allows.

33. Mobilemedia notes that the Commission is currently conducting a rulemaking, which MobileMedia claims may result in modification or elimination of the NPCS spectrum cap. See Amendment of the Commission's Rules to Establish New Personal Communications Services, Narrowband PCS, 12 FCC Rcd 12972 (1997). MobileMedia contends that the Commission should waive 47 C.F.R. § 24.101 pending the resolution of the rulemaking. MobileMedia argues that the merged company should not be forced to divest interests which an amendment of the rules may permit it to retain and that the Commission has, in the past, granted waivers under those circumstances. MobileMedia also argues that a waiver would benefit innocent creditors.

34. The Bureau opposes grant of a waiver. It argues that the fact that the spectrum cap is under review does not warrant granting a waiver. It also argues that the interests in excess of the spectrum cap could be divested without harm to innocent creditors. The Bureau recommends giving the merged company 90 days to come into compliance with the spectrum cap.

35. We agree with the Bureau that MobileMedia has not demonstrated that a waiver of the spectrum cap is warranted. In order to justify a waiver, MobileMedia must show:

> (i) That the underlying purpose of the rule will not be served, or would be frustrated, by its application in a particular case, and that grant of the waiver is otherwise in the public interest; or
>
> (ii) That the unique facts and circumstances of a particular case render application of the rule inequitable, unduly burdensome or otherwise contrary to the public interest .
> . . .

47 C.F.R. § 24.819. MobileMedia has not made a sufficient showing. The mere possibility that a rule may be reexamined does not by itself warrant grant of a waiver. See Stockholders of Renaissance Communications Corp., 13 FCC Rcd 4717, 4718 ¶ 3 (MMB 1998). As the Bureau points out, the rulemaking here does not even specifically propose to modify the rule in question. Additionally, no showing has been made that a requirement to divest noncomplying interests will have an undue impact on the recovery by innocent creditors in this bankruptcy proceeding. Although, as the Bureau notes, we customarily allow 90 days for the divestiture of noncomplying interests, we believe that, given the complexity of the proposed reorganization, a longer period is appropriate. The merged company will therefore have six months after consummation of the merger in which to divest itself of noncomplying interests.

36. Permanent License authority. As noted above (paragraph 3), the Bureau terminated more than 250 authorizations held by MobileMedia that were not constructed and providing service by the applicable deadline. However, because 99 of these had been constructed by the time of that action, the Bureau granted MobileMedia interim authority to operate the facilities to avoid disruption of service to subscribers. MobileMedia now asks that the Commission grant the merged company permanent authority to operate the stations. MobileMedia asserts that this will preserve

continuity of service to subscribers and will allow the merged company to enhance its network. Moreover, Mobilemedia argues that granting the requested authority will not reward wrongdoers, since they will not be associated with the merged company.

37. The Bureau urges that permanent licensing authority should not be granted. The Bureau observes that MobileMedia's authority automatically terminated for failure to construct and that MobileMedia has had an opportunity to make other arrangements to prevent loss of service by the subscribers on these facilities.

38. We agree with the Bureau that no basis has been shown to grant MobileMedia permanent licenses for these facilities. The authorizations in question were terminated as required by 47 C.F.R. § 22.144. While the MobileMedia was permitted to operate the facilities on an interim basis to avoid disruption of service, this reflected no determination that a basis existed to restore the lost authority and no basis has been shown. In order to afford the merged company an opportunity to put its affairs in order, we permit it to operate the facilities for six months following the consummation of the merger.

39. Application fees. MobileMedia seeks a waiver of several thousand dollars in application fees paid in conjunction with the applications related to the reorganization. MobileMedia submits that relief from the fees is appropriate to enable a bankrupt company to conserve its resources for the benefit of innocent creditors as contemplated by the bankruptcy code. The Bureau does not oppose this request.

40. Section 1.1117 of the Commission's rules, 47 C.F.R. § 1.1117, provides that filing fees may be waived upon a showing of good cause and a finding that the public interest will be served thereby. We find that MobileMedia's bankruptcy establishes good cause for waiver of the filing fee. Cf. Implementation of Section 9 of the Communications Act Assessment and Collection of Regulatory Fees for the 1994 Fiscal Year, 10 FCC Rcd 12759, 12762 (1995) (finding evidence of bankruptcy or receivership sufficient to establish financial hardship for purposes of waiver of regulatory fees). Moreover, waiver of the fee will serve the public interest by enabling Mobilemedia to preserve assets that will accrue to innocent creditors. Thus, under the circumstances of this case, we find that waiver of the filing fee is appropriate.

41. Cut-off rules. Ordinarily, each of the various transfers of authority associated with the proposed reorganization would have to be put on public notice for comment. MobileMedia asks that since these transactions are part of the merger, as to which public notice has already been given, there is no reason to require any further public notice. The Bureau consents to this request. Good cause having been shown, we grant the requested relief.

42. Foreign ownership. Under 47 U.S.C. § 310(b)(4), no license may be held by any corporation controlled by another corporation of which more than one-fourth of its capital stock is owned of record or voted by aliens, if the Commission finds that the public interest will be served by revocation of or refusal to grant such license. MobileMedia indicates that the provision of the reorganization granting stock and stock rights to Arch's existing stockholders may result in up to 20.5 percent of stock in the merged company (the subsidiaries of which would hold licenses) being

held by Credit Suisse First Boston Corporation (CSFB), whose ultimate parent is Credit Suisse Group, a Swiss company. MobileMedia further indicates that other foreign ownership will not likely exceed two percent. Thus, foreign ownership in the merged company is not currently expected to exceed the 25 percent benchmark and no special approval is required for the merger to take place. However, MobileMedia notes that it is possible that CSFB might choose to increase its holdings to a level in excess of the 25 percent benchmark following the merger and that other foreign entities also might acquire interests on the open market following the merger. MobileMedia therefore asks that the Commission authorize foreign ownership up to 35 percent, not more than 15 percent of which may be held by non-World Trade Organization (WTO) members.

43. MobileMedia submits that the public interest would be served by granting the requested relief. MobileMedia maintains that: (1) Switzerland as a WTO member country is presumptively entitled to 100 percent participation under Commission policy; (2) other foreign ownership would likely be dispersed and passive; (3) total foreign ownership would likely exceed the benchmark by only a de minimis amount; and (4) any foreign ownership would not be controlling. The Bureau does not oppose this request

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44. We cannot at this time grant the relief Mobilemedia seeks. In Rules and Policies on Foreign Participation in the U.S. Telecommunications Market, 12 FCC Rcd 23891, 23897-98 ¶ 13, 23940-41 ¶¶ 111-13, 24033 ¶ 323 (1997) (Foreign Participation Order), we adopted an open entry standard for WTO member applicants including a presumption in favor of foreign participation by these applicants. The record before us, however, does not disclose that pertinent Executive Branch agencies have been consulted, as provided by the Foreign Participation Order. 12 FCC Rcd at 23940-41 ¶ 113. Because MobileMedia has sought expedited action on its Second Thursday request, we cannot at this time resolve the foreign ownership issue. The parties should therefore present a request for a declaratory ruling as to the foreign ownership issue to the International Bureau, which will be able to conduct the pertinent consultation in accordance with the Foreign Participation Order and issue an appropriate ruling.

VI. ORDERING CLAUSES

45. ACCORDINGLY, IT IS ORDERED, That the Applications for Transfer of Control and Petition to Terminate and for Special Relief, filed September 2, 1998, by MobileMedia Corporation and Arch Communications Group, Inc. ARE GRANTED, subject to the provisions set forth in paragraphs 35, 38, 40, 41, and 44, above.

46. IT IS FURTHER ORDERED, That it appearing that Arch Communications Group, Inc. is fully qualified to be a Commission licensee, the Wireless Telecommunications Bureau IS AUTHORIZED to grant all applications and authorizations relevant to the reorganization plan.

47. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED, provided that if the bankruptcy court disapproves the proposed plan of reorganization or if the plan is not consummated within nine months after approval by the bankruptcy court the action taken herein

shall be void.[7]

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

[7] We expect MobileMedia to keep the Bureau apprised of the progress of the bankruptcy proceeding and the consummation of the reorganization. We specifically expect MobileMedia to report promptly in the event that: (1) the bankruptcy court disapproves the proposed reorganization or modifies it in significant respects, or (2) it appears for any reason that the reorganization will not be timely consummated. Finally, in the event that circumstances warrant, we expect that the Bureau will file a further pleading bringing these matters to our attention.